CHAN KIN CHOI

v.

PUBLIC PROSECUTOR

HIGH COURT, SINGAPORE
YONG PUNG HOW CJ
LAI KEW CHAI J
CHAO HICK TIN J
[CRIMINAL APPEAL NO. 11 OF 1988]
11 JANUARY 1991

EVIDENCE: *Criminal trial - "Mixed" statement by accused - Inculpatory and exculpatory parts - Evidential status - Weight to be given - Statement to be considered as a whole - Criminal Procedure Code [Sing], ss. 122(5), (6).*

The appellant A was accused of murder and after a hearing by the trial Judges, he was convicted. On the day after the offence, A had made a voluntary statement which contained exculpatory as well as inculpatory material, whereby he admitted stabbing the deceased and the circumstances which led to the stabbing of the deceased. This statement was admitted in evidence under s. 122(5) of the Criminal Procedure Code (CPC) as part of the prosecution evidence before A's defence was called. A's Counsel contended that the trial Judges had not given sufficient weight to the exculpatory parts of the statement which, he submitted, established on a balance of probabilities that A had stabbed the deceased without premeditation in a sudden fight and that therefore this offence fell within Exception 4 of s. 300 of Penal Code.

This appeal dealt with the question of the evidential status of the exculpatory part or parts of a "mixed statement" voluntarily made by an accused under s. 122(6) and admitted in evidence under s. 122(5) of the CPC and the role of the Judge in relation to this issue.

Held:

[1] The Court affirmed the ruling of the High Court that it was not the law in Singapore that exculpatory statements in a confession used by the prosecution as part of its evidence were admissible as evidence of the truth of the contents thereof.

[2] The Court approved and followed the House of Lords decision of *R v. Sharp* and held that a mixed statement constituted evidence of the truth of the facts it asserted and the Judge must consider both the incriminating part and the excuses or explanations in determining where the truth lies.

[3] (a) On the facts of this case, the trial Judges had not, in the light of other independent and hard evidence led by the prosecution, given sufficient weight to the exculpatory parts of a statement given by A which established on a balance of probabilities that A had stabbed the deceased without premeditation in a sudden fight;

(b) the case fell within Exception 4 of s. 300 of Penal Code and A was held to be guilty of culpable homicide not amounting to murder.

[Appeal allowed; A sentenced of 10 years imprisonment.]

Cases referred to:

Chee Chiew Heong v. PP [1981] CLJ (Rep) 122
Donaldson & Ors. [1977] 64 Cr App R 59
Findley Duncan [1981] 73 Cr App 359

Haw Tua Tau v. PP [1981] 2 MLJ 49; [1981] CLJ (Rep) 11
Leung Kam-Kwok v. The Queen [1985] 81 CAR 83
Ong Kin Hong v. PP [1990] 3 MLJ 76
Packiam v. PP [1972] 1 MLJ 247
PP v. Lim Chor Pee [1981] 2 MLJ i and v
PP v. Mohamed Noor Jantan [1979] 2 MLJ 80
R v. Duncan [1981] 73 Cr App R 359
R v. Sharp [1988] 1 All ER 65
Storey and Anwar [1968] 52 Cr App R 334
Tsang Yuk Chung v. PP [1990] 3 MLJ 264

Legislation referred to:
Criminal Procedure Code [Sing], ss. 122(5), (6)
Penal Code [Sing], ss. 96, 300, 304(b)

Other source referred to:
The Admissibility and Effect of Exculpatory Statements in Criminal Case [1981] 2 MLJ Ixxi - Stanley Yeo Meng Heong

For the appellant - R. Palakrishnan (assigned) (A. Rajandran with him)
For the respondent - Sowaran Singh

JUDGMENT

Lai Kew Chai J:

This is an appeal against the conviction of the appellant of the capital offence of having murdered one Lee Mui Kee by stabbing him in the neck with a knife at the "Big A" Fried Chicken Restaurant at Upper Serangoon Road on 8 April 1985 at about 9 pm. At the conclusion of the hearing of this appeal, we were of the view that the learned trial Judges had not, in the light of other independent and hard evidence led by the prosecution, given sufficient weight to the exculpatory parts of a statement given by the appellant which established on a balance of probabilities that the appellant had stabbed the deceased without premeditation in a sudden fight. As the case in our view fell squarely within exception 4 of s. 300 of the Penal Code, the appellant was guilty of culpable homicide not amounting to murder and we sentenced him under s. 304(b) of the Penal Code to a term of 10 years imprisonment.

This appeal raised a question of general importance in the law of evidence in a criminal trial in relation to the evidential status of the exculpatory part or parts of a "mixed statement" voluntarily made by an accused under s. 122(6) of the Criminal Procedure Code (the CPC) and admitted "in evidence" under s. 122(5) of the CPC.

The evidence giving rise to this vexed question of law and practice may be summarised as follows. The appellant is a male Chinese. In April 1985 he was 26 and was working as a casual labourer. He and the deceased had been childhood friends. The deceased, a lorry driver, was also 26. At least two persons must have seen the killing but no witness came forward who could testify as to the actual stabbing and how it had occurred. The proprietor of the restaurant and 4 of his employees gave evidence. Three of the employees stated in evidence that the appellant and the deceased had patronised the restaurant that night at about 8 p.m. They sat at table 2 as marked on the sketch plan of the restaurant. It was at one far end of the restaurant, near the wall, and was away from the main and only entrance of the restaurant. They were drinking beer. The deceased sat next and to the left of the appellant. Two of the restaurant employees also testified that they saw at least two other

male Chinese coming into the restaurant and sitting at the same table with the appellant and the deceased. They sat opposite them. Another witness, Toh Kwee Choo, said that she saw 2 or 3 other male Chinese entering the restaurant and joining the appellant and the deceased. She said:

> not long after that there was this noise of tables and chairs falling.

The police, despite their efforts, had not been able to trace these two or three male Chinese who could have shed a great deal of light as to what had happened that fateful night.

However, all five witnesses said that they heard a commotion. Tables, chairs and glasses were heard to have been overturned or smashed. Two of them, Lee Leong Huat, the supervisor in the restaurant, and Chung Siew Choo, a waitress also said in evidence that they saw the deceased running away from table 2, bleeding from the neck, and he was chased by the appellant who tried to stab the deceased. They said, however, that the appellant did not stab the deceased as the deceased had fallen down and had succumbed to his wound near table 9, which was near the main entrance of the restaurant. The appellant threw down two knives which were recovered from the vicinity of table 9 and ran out of the restaurant.

The investigating officer told the trial Judges that he saw a trail of blood leading from the restaurant to the pavement outside the shopping centre in front of a coffee house. The analysis of the blood swabs taken revealed that the blood taken at the restaurant and on both the knives was group O, which was the blood type of the deceased. The blood taken from the trail of blood leading from the restaurant to the pavement outside the shopping centre was group B. The accused's blood group was A. This piece of evidence clearly suggested that another person had been injured.

The autopsy showed that the deceased had been stabbed in the left lower neck to a depth of 24 cm. The wound itself was 6 cm long. The blade of the knife had transacted both the arteries in the neck and had also penetrated the lung. The blade was plunged downwards and backwards from left to the right side of the deceased's body at an angle of 45 degrees. This was the fatal wound. Haemorrhage from this wound was the cause of death. The deceased had also sustained a 3 cm superficial wound at the back of his right wrist. It was a defensive wound.

At 2.50 a.m. on 9 April 1985 the appellant surrendered himself to the police. He took the investigating officer to the Farrer Road hawker centre to recover his bloodstained T-shirt. He was brought to the criminal investigation department. Between 7.25 a.m. and 8.30 a.m. that same morning, after the fatefull night before, he made a voluntary statement to the investigating officer. His statement was as follows:

> On 6 April 1985 the deceased "Ah Tee" asked me whether I was prepared to pay the loan of $2,000. As I did not borrow this sum of money from the illegal money lender I refused to repay him the loan. Ah Tee then told me to get someone to settle the matter with him. He had suggested that I could go to his house at Hougang, Avenue 3 on 8 April 1985 at 7.30 pm. At the stated time I went to his house to look for him, but he was not at home. I carried two knives with me, I tucked them in my trousers at the left waist and covered them up with my "T" shirt. I bought the knives from an emporium at Hougang Avenue 6 before going to look for the deceased at his house. When I could not find him I went to the ground floor to wait for him.
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> I wish to add that I brought the knives to his place because I expected that I would be confronted by the deceased and his friends when I was unable to give him any money. In fact prior to this meeting there were instances when I was assaulted by the deceased and his friends

when I did not have money to give them. About half an hour later I saw the deceased coming towards the block. When I spotted him I called him. Ah Tee came to me and asked me to follow him to Upper Serangoon shopping centre, I agreed and sat on his motor cycle. On our way to the Upper Serangoon shopping centre I noticed that there were two motor cycles behind us. I believe that the motor cyclists behind are from his gang. On arrival Ah Tee led me to the "Big A" fried chicken restaurant, both of us occupied a table in the restaurant. Ah Tee ordered a jug of beer and some chicken. The motor cyclists and the pillion riders did not enter the restaurant. They waited outside.

Whilst we were still in the restaurant another four of deceased gang came into the restaurant, one of them sat with us while the others sat at the next table. When we were about to finish the chicken and the beer, Ah Tee asked me whether I had brought the $2,000 for him. When I answered him that I did not have money to give him, I agreed to pay the loan. On hearing what I said Ah Tee was unhappy and gave me a punch. I managed to dodge away but I was still hit slightly by the punch on my right cheek near the eye, after which Ah Tee and his gang stood up and came towards me. Before they could do anything I whipped out a knife from my trousers and stabbed Ah Tee with it. I remember stabbing the deceased once. I then saw one of his gang members came forward. I immediately whip out another knife to attack him. I did not know whether I had stab that person or not. At the same time I saw Ah Tee collapse onto the ground. I immediately threw the knife which I was holding and fled.

From the scene I took a taxi to my friend's house at Farrer Road to borrow a shirt from my friend. I changed into fresh clothing and sat in the Farrer Road hawkers' centre for a while. After I had a cup of tea at the hawkers centre. I took a taxi to Punggol and went into hiding. In my uncle's house I considered the matter again and decided to surrender myself to the police, I then requested my uncle to send me to the Paya Lebar Police Station where I surrender myself. That is all I have to say.

The statement was admitted "in evidence" under s. 122(5) of the CPC as part of the prosecution evidence. The prosecution then closed its case against the appellant.

Former Counsel of the appellant submitted that the appellant had no case to meet. He recognised that the trial Judges, in addition to the prosecution evidence set out earlier in this judgment, also had before them an admission by the appellant that he had stabbed the deceased. But former Counsel of the appellant stressed that the trial Judges, nevertheless, had before them the explanations and allegations of the appellant as to the circumstances leading to the stabbing. It was submitted that the appellants explanations and allegations, viewed against the other prosecution evidence as a whole, were sufficient to establish one or more of the special exceptions to s. 300 of the Penal Code. In connection with this submission, the trial Judges in their judgment set out the following salient features of the appellant's statement:

(1) prior to the incident, the accused had been assaulted by the deceased and his friends when he did not have money to give them;

(2) prior to his meeting the deceased on 8 April 1985, the accused bought two knives with the expectation that he would be confronted by the deceased and his friends;

(3) he met the deceased at the ground floor of the deceased's flat and agreed to follow the deceased to the "Big A" restaurant; he sat on the deceased's motor cycle;

(4) they were followed by two motor cycles whose riders belonged to the deceased's gang;

(5) four of the deceased's gang came into the restaurant while he and the deceased were drinking and eating;

(6) the deceased gave him a punch which hit him slightly on the left cheek;

(7) the deceased and his gang stood up and came towards him whereupon he took out a knife and stabbed the deceased; when one member of the gang came forward, he took out the other knife to attack him.

The submissions of former Counsel of the appellant directly raised the issue as to the evidential status of exculpatory or self-serving statements made by an accused and admitted under s. 122(5) of the CPC. Reliance was placed on the following authorities: (i) *PP v. Mohamed Noor Jantan* [1979] 2 MLJ 80; (ii) *Packiam v. PP* [1972] 1 MLJ 247; *Chee Chiew Heong v. PP* [1981] CLJ (Rep) 122; (iv) *PP v. Lim Chor Pee* [1981] 2 MLJ i and (v) an article "*The Admissibility and Effect of Exculpatory Statements in Criminal Cases*" by Stanley Yeo Meng Heong published in [1981] 2 MLJ Ixxi.

The trial Judges reviewed extensively the authorities cited. It is not for us to repeat them except for two cases. In coming to their views the trial Judges placed great reliance on *Storey and Anwar* [1968] 52 Cr App R 334 and the Privy Council decision in *Leung Kam-Kwok v. The Queen* [1985] 81 CAR 83. We would now have to consider these two authorities in some detail to see if they support the views taken by the trial Judges.

In *Storey and Anwar* (*supra*) police had found a large quantity of cannabis in the defendant's flat. In an unsworn and voluntary statement, the defendant, a call girl, claimed that the cannabis belonged to a man, an Indian she called Ali, who had brought it into her flat against her will. She said she was remonstrating with Ali when police arrived. Her explanation, if true, would have proved that she was never in possession of the cannabis. To a submission that she had no case to meet, the trial Judge overruled it and called for the defence. She elected to remain silent. Thereupon the trial Judge left the issue as to the truth or otherwise of the defendant's explanations to the jury. She was convicted.

It is noteworthy that Widgery LJ identified the issue before the Court of Appeal (Criminal Division) in the following terms:

> The question which arises in this case is whether the fact that she gave shortly afterwards an explanation which, if true, would provide a completely innocent explanation is enough to produce a situation in which the learned Judge's duty was to say that there was no case to meet.

The Court of Appeal upheld the decision of the trial Judge in calling for the defence. We would emphasise certain portions in the following passage of the judgment of Widgery LJ at pp. 337-338:

> The Court has given careful consideration to this important point. We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.
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> Accordingly, in our judgment, in this case the fact that the cannabis was on the applicant's bed in her flat was in itself some evidence of possession to go to the jury. Her unsworn explanation, although, if true, would have been a complete answer to the charge, did not cancel

out or nullify the evidence which was provided by the presence of the cannabis. **It was ultimately for the jury to decide whether that explanation was or might be true, and it was not for the Judge necessarily to accept it at the stage when he was considering the submission**. In the event therefore, we have come to the conclusion that the learned Judge was entitled to and right to leave this matter to the jury and not to withdraw it from them merely because the accused's unsworn explanation would, if true, have been a complete answer to the charge.

Two important points emerge, one directly relevant to the issue under consideration and the other on the role of a trial Judge as a decider of law at the close of the prosecution case and his role as a decider of fact when the defence is called. The first point is this. It was clearly acknowledged by Widgery LJ that the exculpatory parts of a mixed statement have to be considered by the jury. That could only be so if and only if the exculpatory parts of a mixed statement are also regarded as evidence before the jury. We should at once say that its evidential value is obviously quite a separate and distinct matter.

Secondly, and this point has a bearing later in this judgment, what Widgery LJ said in relation to the role of a trial Judge and jury in England, as a decider of law and deciders of fact respectively, was a clear precursor of the principles subsequently enunciated in the famous speech of Lord Diplock in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, at p. 17:

At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and Counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance.

We turn next to *Leung Kam-Kwok v. The Queen* (*supra*). It is instructive to bear in mind one aspect of this decision. It was held that:

having elected not to give evidence, the appellant's statements admitting responsibility for the killing but claiming he had no intention to kill, were not evidence of the truth of the facts so stated, but only evidence that he had made them, **and it was then for the jury to evaluate the admission and the unsworn explanation or excuse as they thought fit.** (See the headnotes and p. 91, Emphasis is mine).

Lord Roskill at p. 91 went on to approve what was "succinctly and correctly" stated by James LJ when giving the judgment of the Court of Appeal (Criminal Division) in *Donaldson & Ors.* [1977] 64 Cr App R 59 as follows:

In our view there is a clear distinction to be made between statements of admission adduced by the Crown as part of the case against the defendant and statements entirely of a self-serving nature made and sought to be relied upon by a defendant. When the Crown adduce a statement relied upon as an admission it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of facts stated therein. If the jury find that it is an admission they may rely upon it as proof of the facts admitted. If the defendant elects not to give evidence then in so far as the statement contains explanations or qualifications

favourable to the defendant, the jury, in deciding what, if any, weight to give to that part of the statement, should take into account that it was not made on oath and has not been tested by cross-examination. When the Crown adduce evidence in the form of a statement by the defendant which is not relied on as an admission of the offence charged such a statement is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated.

The trial Judges called for the defence. This we think was entirely proper. We agreed with their views that "(t)here was credible evidence that the (appellant) had intended to stab the deceased at the neck and such stabbing was sufficient in the ordinary course of nature to cause death".

We should now refer to an astonishing submission made by former Counsel of the appellant. In contending that there was no case to meet, he submitted that the explanations of the appellant given by the appellant in his voluntary statement should be accepted as true on the ground that the voluntary statement had been tendered by the prosecution as part of its case against the appellant. This extravagant submission not unexpectedly received short shrift from the trial Judges. They ruled that it was not the law in Singapore that exculpatory statements in a confession used by the prosecution as part of its evidence were admissible as evidence of the truth of the contents thereof. That ruling was patently correct. Otherwise, prosecution could never put in a confession of murder if they are bound to accept the truth of an accused's explanations and thus defeat the purpose of using the confession.

Next, we come to the basic difficulty in this appeal. It relates to the evidential status of a mixed statement already admitted in evidence after a defence is called. How should trial Judges direct themselves when performing the function as deciders of fact in regard to mixed statements, particularly in a case where an accused person elects, as he is entitled, to remain silent?

The High Court of two Judges (Lai J and Grimberg JC) in March 1988 had to grapple with this problem in a case of murder in *PP v. Ong Kim Hong @ Tien Kim Hong*, Criminal Case No. 12 of 1986. The 90 page judgment of the High Court, to which the mixed statement of the accused was appended, is unreported. The brief facts were as follows. Ong Kim Hong, 49 years of age and the proprietor of a shoe factory, was charged for the murder of a female aged 34 an hour or two before noon on 24 December 1984. She was found dead lying on the floor of a toilet of the premises of the Singapore Footwear Merchants Association, Block 68, Lorong 16, Geylang, Singapore. She died of multiple injuries to the head, neck, chest and abdomen which could have been inflicted with a great deal of force by an instrument such as an iron pipe. She was a clerk of the Association of which the accused was a member. DSP Koh Kong Song, a finger print expert, testified that the print lifted from the tap head in the toilet was that of the accused's right thumb. Sixteen characteristics of the print lifted from the tap head corresponded with those of the accused's right thumb. When the body was discovered in the afternoon, the water from the tap was still running. The maintenance officer of a company employed to maintain and look after the security of the Association's building said in evidence that at about 10.30 a.m. on 24 December 1984 he saw the accused, who he positively identified, hurriedly leaving the Association premises.

Evidence was also led from other witnesses relating to the movements of the accused that morning. It was further established that a roll of Sun-X Film, a substance used to stick to glass surfaces to reduce the rays of the sun, was found at the pantry of the Association premises by the Investigating Officer when he visited the scene. He did not seize it as its relevance was not then apparent to him. The caretaker of the Association said that she had

thrown it away. It was further established that the accused had after the killing asked a witness to buy for him another roll of Sun-X film, as if to replace the one he had left at the Association. The Investigating Officer later seized the replacement roll of Sun-X film from the office of the accused.

On 26 December 1984 the accused was arrested. He made a statement which was a total denial of any involvement in the murder. He stoutly maintained that stance until 7 January 1985 when he was confronted by the investigating officer with the facts relating to the Sun-X film. He then orally confessed and told the investigating officer that he had killed the deceased and had thrown the iron pipe into the Whampoa River. He led the officer there but the officer decided not to attempt to retrieve it as in his view it would have been a futile exercise.

Later the same day, the accused made a long written statement. He confessed to the killing but gave several explanations. He claimed in exculpation that he had done so after an argument with the deceased. He said the deceased insulted him and he slapped her after which he went to the toilet, wishing to end the altercation. But the deceased followed him and assaulted him with a broom made of fibre from the leaves of coconut trees, prodding and striking his genitals with it. He further claimed that he fell on the floor of the toilet as a result of the assault. Seeing an object close at hand, he picked it up and struck the deceased with it.

The trial Judges called upon the accused to enter his defence. He elected to remain silent. His Counsel submitted that the mixed statement of the accused had proved on a balance of probabilities that there was grave and sudden provocation, self defence and sudden fight under Exceptions 1, 2 and 4 of the Penal Code. Counsel for the defence also submitted that as a matter of law it was not open to the trial Judges to reject the exculpatory parts of the mixed statement once and if they decided to accept the inculpatory parts of the statement.

The trial Judges rejected this submission. They held that they were entitled to test the evidential value of the exculpatory parts of the statement against other evidence before the Court "in order to assess their weight." They stated at pp. 76-77 thus:

> We commenced our consideration of Counsel's submission by considering the confession. It is what has become known as a "mixed statement", that is to say a statement containing a confession as well as self-exculpatory parts. *Findley Duncan* [1981] 73 Cr App 359, established that when a mixed statement is under consideration the whole statement must be looked at, that is to say both the incriminating parts and the excuses or explanations. It is permissible for the Court to proceed upon the basis that the incriminating parts are likely to be true (otherwise why should the accused have uttered them?), whereas the excuses might not have the same weight.
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> Furthermore, it is appropriate where the accused has elected not to give evidence, as in the present case, to take that fact into account in assessing the weight of the exculpatory parts of the statement. In short, all the components of a "mixed statement" (which, having been admitted, becomes part of the prosecution evidence) are evidence of the facts referred to in it. These components may be tested against the other evidence before the Court, in order to assess their weight. We were obliged, therefore, to reject (Counsel's) argument that it was not open to us to accept those parts of the confession in which the accused admitted killing the deceased, and reject those parts of it in which he sought to exculpate himself.

The accused unsuccessfully appealed to the Court of Criminal Appeal. The appellate Court concluded that the trial Judges were entitled on all the evidence to reject the defences which were based solely on the statements made by the accused. As the appellate Court did not

criticise the principles which were applied by the trial Judges in that case, it may be taken that they had implicitly approved them. On one view, it may be said with some force that the appellate Court on that occasion came very close to approving the principles set out in *Findley Duncan* (*supra*). In *Ong Kin Hong v. PP* [1990] 3 MLJ 76, 78 A/B - E/F they stated:

> The trial Judges, after carefully examining the exculpatory parts of the appellant's evidence, and having done so, rejected them. They came to the conclusion that the accused had committed a premeditated assault upon the deceased, intending to kill her, and that he had brought onto the premise of the Association, an iron rod or bar with which to achieve his purpose, which he threw into the Whampoa River after having achieved it. The trial Judges found that there was evidence before them that, in the days immediately before the murder, the deceased had been wary of the appellant, not wishing to be left alone when he was in the vicinity. There was also produced in evidence a note written by the deceased a few days before she died which indicated that an incident had occurred involving the appellant which had distressed the deceased. In a written statement made to the police on the day of his arrest, the appellant spoke of rumours circulating in the Association to the effect that he was lecherous, an allegation which he denied. The trial Judges concluded that the appellant regarded the deceased to be the source of these rumours. They were satisfied beyond reasonable doubt that the appellant was guilty of the murder of the deceased and they accordingly convicted the appellant.

The Court of Criminal Appeal in *Tsang Yuk Chung v. PP* [1990] 3 MLJ 264 referred to the question whether a self-exculpatory statement admitted in evidence under s. 122(5) of the CPC is evidence of the facts stated therein or one which a Court is entitled to take a full account of. But the appellate Court expressed the view that it was premature for them to comment on the matter as it did not arise for a decision in that case. At p. 266 it stated:

> In our judgment, a statement whether or not it is purported to have been made under s. 122(6) is admissible in evidence so long as s. 122(5) is satisfied. There is no doubt that an inculpatory statement so admitted is evidence of the facts stated therein. It is not necessary for us to decide whether an exculpatory statement so admitted is evidence of the facts stated therein or, as the High Court put it in another way in *Chan Sway Beng's* case, one 'which the Court as entitled to take a full account of'. We understand that this issue has arisen in *PP v. Chan Kim Choi* where the High Court held that exculpatory statements when given in accordance with s. 122(6) and tendered in Court pursuant to s. 122(5) may be admitted as part of the prosecution's evidence, but not as truth of the contents thereof. Since this issue has not arisen before us and since the decision of the High Court is under appeal, it is premature for us to comment on the decision.

The question before us was directly raised and, in our view, fully addressed by the House of Lords in their judgment in *R v. Sharp* [1988] 1 All ER 65. That judgment was delivered at the end of 1987 and it was reported within the first quarter of 1988.

In relation to the trial of this case below, the trial Judges heard it in July 1988. They announced their decision on 14 July 1988. They delivered their grounds of decision on 29 December 1988. It was unfortunate, in our view, that the seminal decision of *R v. Sharp* (*supra*) was not brought to their attention. It was even more unfortunate that the earlier and equally apposite decision of Lord Lane CJ in *R v. Duncan* [1981] 73 Cr App R 359, which was approved by the House of Lords in *R v. Sharp* (*supra*), was also not cited to the trial Judges.

The factual context which gave rise to *R v. Sharp* (*supra*) was briefly as follows. The defendant stood trial on a charge of burglary of a dwelling house. He was seen jogging at 6.30 a.m. one morning by two police officers who were about to arrive in their car at the dwelling house in response to a telephone call. The defendant ran in the direction of his car and drove off at speed. The police officers gave chase in their car but lost sight of the

defendant for a while, after the defendant had driven into a slip road. A short while later, they again saw him driving his Cortina. The police stopped him. He turned abusive and drove off again at great speed. Later, the police recovered the Cortina at a golf course. They recovered glass particles from the defendant's track suit which he was wearing that day and on the driver's seat. Forensic evidence established that the glass recovered and the glass samples taken from the burgled house were indistinguishable. Three days later, he made a voluntary mixed statement to the police. He claimed that his car had an accident, and a small part of it had fallen out. He was running back to retrieve the part. He denied that he had attempted to escape from the police officers because he did not know that they were police officers. He also explained that he had driven into the slip road to urinate. As for driving off again from the police, he claimed that he had reason for doing so, which he had given to his solicitor, but he refused to tell the police what it was.

The accused elected to remain silent and he was convicted of burglary. But the trial Judge, in treating the defendant's statement as a mixed statement, directed the jury selectively. He said they were entitled to regard his statement that he was in the area at the time of the burglary as an admission and that the other exculpatory parts of the statement were not evidence of the facts related. The Court of Appeal allowed the appeal and quashed the conviction on the ground that the trial Judge's direction to the jury was contrary to *R v. Duncan* (*supra*).

The question certified for decision of the House of Lords in *R v. Sharp* (*supra*) was in the following terms:

> Where a statement made to a Police Officer out of Court by a defendant contains both admissions and self-exculpatory parts do the exculpatory parts constitute evidence of the truth of the facts alleged therein?

The House of Lords answered the question by ruling that the whole statement constituted evidence of the truth of the facts it asserted and the Judge should have directed the jury that both the incriminating parts and the excuses or explanations must be considered in determining where the truth lies, although where appropriate, as it usually would be, the Judge might, and should have, pointed out that the incriminating parts were likely to be true whereas the excuses did not carry the same weight. They cited with unqualified approval what Lord Lane CJ said in *R v. Duncan (supra)* at p. 365:

> Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the Judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the Judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.

In our considered view, the law in Singapore in relation to the evidential status of mixed statements admitted under s. 122(5) of the CPC is precisely the same. The only rider we would add is that in Singapore the deciders of fact in a criminal trial are Judges and Judicial Officers who are professionally trained to apply the rules of evidence under the Evidence Act.

We now turn to the trial Judges' treatment of the evidence at the close of the defence in the trial below. They stated their findings as follows:

> It was entirely possible that the account of the incident given in the cautioned statement was accurate as to the events described therein. But it was also possible that it was not a complete account of what had happened. On the evidence adduced by the prosecution, the accused was seen chasing the deceased with a knife in his right hand. The accused was also seen to have made a motion of stabbing the deceased. This event was not recounted in the cautioned statement. Giving such weight as we could to the cautioned statement in the light of the evidence adduced by the prosecution, we were unable to conclude that the accused had discharged, on a balance of probabilities, the burden of proving any circumstances which brought him within the general exception of right of private defence under s. 96 of the Penal Code or any of the special exceptions 2, 4 and 1 to s. 300 of the Penal Code.

Counsel for the appellant in this appeal is Mr. Palakrishnan. We would like to say that we were greatly indebted to him for drawing our attention to the leading authorities we have discussed in this judgment. He submitted that the trial Judges at the conclusion of the trial had failed to give sufficient consideration to the exculpatory parts of the appellant's mixed statement in the light of the incontrovertible evidence led by the prosecution which in material respects plainly supported his contention that the appellant had proved on a balance of probabilities that he had stabbed the deceased without premeditation in a sudden fight within Exception 4 to s. 300 of the Penal Code.

We agreed with his submissions and our reasons are as follows. On that fateful night, it was plain that the appellant found himself in the restaurant in a dangerous situation. The deceased was at the material time joined by his gang. It was probable that the appellant had armed himself with two knives for his own protection because he was, as he had anticipated, greatly out-numbered. The prosecution witnesses from the restaurant confirmed that two or three members of the gang of the deceased had joined them. A sudden fight broke out immediately after the deceased was joined by his gang. Tables and chairs were overturned. Glasses were broken. There was no reason to disbelieve the appellant when he said that it was the deceased who had started the fight. The absence of any evidence of injury on the appellant was an innocuous fact as the appellant had stated in his statement that the deceased had only slightly injured him. Faced with the danger posed by the gang he stabbed the deceased only once on the neck. We have to note that there was incontrovertible evidence that he had also knifed a member of the deceased's gang as bloodstains, different from the blood group of either the appellant or the deceased, were found at the pavement outside the restaurant. The appellant was therefore fighting against at least two persons from the opposing camp.

We refer to the evidence of two prosecution witnesses that the appellant had chased the deceased and had made the motion of attempting to stab the deceased. This evidence was, in our view, the opinion of the two witnesses who came to the conclusion because the appellant was seen following the deceased. Having regard to the layout of the restaurant, we noted that the path taken by the deceased and followed by the appellant was the only path that led to the only exit of the restaurant. It was not an unreasonable inference in our view to think that both of them had in fact intended to get out of the restaurant. Certainly, it was the natural thing for the appellant himself to have done so. There were still at least two other members of the deceased's gang who were near table 2 in the restaurant and the appellant must have feared that they might attack him. We refer to the fact that the appellant was seen holding up his knife as though attempting to stab the deceased again. It seemed

to us that it was also not an unreasonable inference that in holding up the knife and making his getaway, he was adopting a threatening posture merely to keep the deceased and the other members of the gang at bay. He wanted to get away, as in fact, he did.

In these circumstances, we came to the conclusion that the appellant had stabbed the deceased without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. He had only inflicted one blow. Although, it turned out to be fatal, we could not say that in all the circumstances of the case, he had taken undue advantage, seeing that he was dangerously out-numbered, nor could we say that he had acted in a cruel or unusual manner.

We accordingly allowed the appeal and convicted the appellant of the lesser offence of culpable homicide not amounting to murder.

Also found at [1991] 2 CLJ 1049